Texas Criminal Appeals & Habeas Applications:

"The Basics" For Victim's Advocates

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I. Parties

The party bringing an appeal is called the "Appellant." The party responding to an appeal is called the "Appellee." In a typical criminal appeal, a convicted and sentenced defendant will be the appellant and the state will be the appellee.

II. Right to Appeal

Defendants who are convicted and sentenced for crimes in this state generally have the right to appeal. Tex. Code Crim. Proc. Ann. art. 44.02. A defendant who pleads guilty or no contest pursuant to plea bargain with the state, however, has only a limited right to appeal. Plea bargaining defendants can appeal only: (1) matters that were raised in a pre-trial motion and ruled upon before the entry of the plea, or (2) matters that the trial court gives them permission to challenge on appeal. Tex. R. App. P. 25.2.

The state also has a limited right to appeal. A state's appeal can only be taken for reasons that are specified in article 44.01 of the Code of Criminal Procedure. Tex. Code Crim. Proc. Ann. art. 44.01. Some common reasons the state will appeal include: (1) dismissal or "quashing" of a charging instrument, (2) changing a judgment, (3) granting a new trial, and (4) granting a motion to suppress evidence.

III. Notice of Appeal

An appeal begins with the filing of a notice of appeal in the trial court. This gives the trial court notice that a party desires to challenge its judgment in whole or in part. When properly prepared and timely presented, a notice of appeal has the effect of invoking the jurisdiction of the court of appeals.

In criminal cases, a defendant must give notice of appeal within 30 days of the date that his sentence is imposed in open court. Tex. R. App. P. 26.2. If he files a timely motion for new trial, the deadline is extended to 90 days. Tex. R. App. P. 26.2.

If the state desires to appeal from an action by the trial court, its notice of appeal must be filed within 20 days after the day the trial court does the act from which the appeal is taken. Tex. R. App. P. 26.2. A notice of appeal by the state must be signed by the elected prosecutor.

There are cases in which a notice of appeal must be filed much earlier than in criminal cases generally. For example, in an appeal from an involuntary commitment (due to mental incompetence), a notice of appeal must be filed within 10 days of the date the trial court signs the order committing the defendant. Tex. Health & Safety Code § 574.070.

In cases in which the death penalty has been assessed, no notice of appeal is necessary. These cases are automatically reviewed in a direct appeal by the Texas Court of Criminal Appeals. Tex. R. App. P. 25.2(b).

IV. The Record on Appeal

The record on appeal consists of the clerk's record and the reporter's record. *See* Tex. R. App. P. 34.1. In a direct appeal, a court of appeals is not authorized to consider things not included in the record on appeal. Sometimes, appealing parties try to attach documents to their briefs that were not first submitted to the trial court and that are not contained in the appellate record. Such documents may not be considered by the court of appeals in a direct appeal.

It is the duty of the trial court clerk and the court reporter to ensure that the record is filed in the court of appeals. Tex. R. App. P. 35.3. Still the parties play a big role in directing the trial court and the court reporter concerning which parts of the record should be forwarded to the court of appeals.

The record is due to be filed in the court of appeals generally within 60 days after sentencing of the defendant in open court or the signing of an appealable order. Tex. R. App. P. 35.2. If a motion for a new trial is timely filed, this will extend the deadline to 120 days if the motion is denied. If the motion is granted, the deadline is extended to 60 days after the order granting the motion is signed. Tex. R. App. P. 35.2.

After the record on appeal is filed, the trial court generally loses jurisdiction to act in a case until it receives a mandate from the court of appeals. Tex. R. App. P. 25.2(g). As discussed later in this paper, however, a trial court may act after the record on appeal has been filed if a case is abated to the trial court from the court of appeals for a specific purpose.

V. Motions

A. Motions to Extend Time

Almost any due date or time frame for completion of a task in an appeal can be extended. Typically, the party who is required to act by a date or time certain must seek an extension of time from the court of appeals by filing a motion for an extension of time. It is not uncommon in criminal cases for defendants to seek two or three extensions of time to file a brief. It is also not uncommon for the state to seek one or two extensions of time to file its brief in criminal cases. As a practical matter, this means that it can be very difficult early on to determine how long it will take to get a matter fully briefed and ready to be submitted to a court of appeals. Extensions sought by the parties can sometimes add up to and beyond five or six months to a briefing schedule.

B. Other Motions

Other motions can also increase the time a matter spends lingering in the appellate court. A comprehensive list of all the motions that might be filed in an appeal does not

exist. However here are a few examples of common motions: (1) a motion to abate a case to the trial court so that findings of fact can be made; (2) a motion to strike a brief for failing to comply with the briefing rules; (3) a motion to supplement the record on appeal; (4) a motion to dismiss an appeal.

VI. Transfers

The Texas Supreme Court occasionally acts to equalize the dockets and the workloads of the various courts of appeals in this state by transferring cases from one court of appeals to another. When an appeal is transferred from one court of appeals to another, the court of appeals to which the case is transferred must decide the case in accordance with the precedent (case law) of the court of appeals from which the case has been transferred. Tex. R. App. P. 41.3.

VII. Briefs

A. Time for Filing

Generally speaking, an appellant's brief is due to be filed in the court of appeals within 30 days after the record on appeal is filed in the appellate court. Tex. R. App. P. 38.6(a). Also, generally speaking, an appellee's brief is due within 30 days after the appellant's brief is filed. Tex. R. App. P. 38.6(b). A reply brief may be filed by the appellant within 20 days after the appellee's brief is filed. Tex. R. App. P. 38.6(c). The time for filing a brief may be extended by a court upon the motion of a party. Tex. R. App. P. 38.6(d). It is common for parties to seek anywhere from one to three thirty-day-extensions to file their briefs.

B. Appellant's Brief

An appellant's brief is required to identify "concisely" the issues or points presented on appeal. Tex. R. App. P. 38.1(f). Generally speaking, the appellant may only raise issues in an appeal that have been first presented to the trial court in the form of an objection, motion or request. Tex. R. App. P. 33.1. The appellant's brief must contain: (1) a statement of the facts pertinent to the issues raised, as well as (2) argument for the contentions made. The statement of facts and argument must also be supported by: (1) references to the record on appeal, and (2) citations to supporting authorities like constitutional provisions, statutes, rules, and court opinions. Tex. R. App. P. 38.1(g) & (i).

C. Appellee's Brief

An appellee's brief (usually written by prosecutors who represent the state in criminal cases) will generally respond to the issues raised in an appellant's brief. If an appellee is not satisfied with an appellant's recitation of the facts of the case, the appellee may supply the court of appeals with its own version of the facts. The court of appeals

will have a copy of the record and will ultimately decide on its own which version is more accurate.

Because prosecutors have an ethical obligation not to just get convictions but to seek justice, in some rare cases prosecutors will concede error in a criminal case. However, most of the time, a prosecutor will contest the issues presented in the appellant's brief by arguing in its own appellee's brief that the errors alleged in the appellant's brief: (1) lack merit, (2) are waived because they were not first presented to the trial court, or (3) are harmless and should therefore not result in a reversal.

D. Reply Briefs and Other Filings

Reply briefs are not filed in every case, but they are not uncommon. The parties to an appeal will also frequently file other supplemental items in an appeal, like letters containing supplemental authorities that were not contained in their original briefs.

VIII. Abatements

Many times, a court of appeals will temporarily abate an appeal, sending jurisdiction back to the trial court to deal with matters that that are best resolved by the trial court. One example is when a defendant has failed over and over again to file his brief on appeal. In that situation, courts of appeals commonly abate the case to the trial court so that the trial court can determine whether the defendant's attorney has abandoned him and whether the defendant still wishes to continue his or her appeal. Another situation that can result in an abatement is when a trial court has failed to make findings of fact that are required. In situations like these, the court of appeals will usually abate the case to the trial court and order the trial court to conduct a hearing and resolve the particular issue within a specific time frame. After the expiration of the time specified, jurisdiction reverts back to the court of appeals and the appeal continues from there.

IX. Oral Arguments

The parties to an appeal may request that the court of appeals grant them an opportunity to present oral argument. Tex. R. App. P. 38.1(e). However, even when it has been requested, the courts of appeals are authorized to deny oral argument. Tex. R. App. P. 39.1.

Each court of appeals decides on its own how much time will be allowed for argument. It is common that parties presenting a case by oral argument will be permitted between 15 and 20 minutes to argue their cases. Oral arguments also present an opportunity for the Justices who are deciding the case to ask questions of counsel before issuing an opinion.

Appeals are a very paper-intensive process. Oral arguments are typically the only time during an appeal when the public can actually witness the proceedings of the court. The victim or victims, the victim's guardian, and/or close relatives of a deceased victim, may want to be notified of the date, time, and location of the oral argument so that they can attend.

X. The Decision Makers

The various appellate courts in this state are presided over by anywhere from three to thirteen Justices. Appellate cases are usually decided in a court of appeals by a panel of three Justices who are assigned to decide the case.

Sometimes all of the Justices serving on the court will participate in deciding the case. When that happens the court of appeals is said to be acting "en banc." Tex. R. App. P. 41. The courts of appeals can choose on their own to sit "en banc" in deciding a particular case, or they can do so after being requested by a party. Even if a motion for the court to sit "en banc" is filed, the court can still refuse to grant the motion.

The high courts in this state, including both the Texas Supreme Court and the Texas Court of Criminal Appeals, always sit "en banc" when deciding cases. While preliminary motions may be decided by a single Judge or Justice, the result in a case where review has been granted is always reached after a vote of the entire court.

Even when a court sits "en banc," one or more Justices can always choose not to participate in a given case. Justices must remain free to recuse themselves when they believe that their participation in deciding a case might raise the appearance of impropriety.

XI. Opinions of the Appellate Courts

According to the Rules of Appellate Procedure, a "court of appeals must hand down a written opinion that is as brief as practicable but that addresses every issue raised and necessary to a final disposition of the appeal." Tex. R. App. P. 47.1.

An opinion of a court of appeals must be designated either an "Opinion" or a "Memorandum Opinion." Memorandum Opinions are designated as such when "the issues are settled." In those cases, the court writes an opinion no longer than necessary to advise the parties of the court's decision and the basic reasons for it.

In criminal cases, all opinions and memorandum opinions must also carry the notation "publish" or "do not publish." If an opinion involves something novel, like a new rule of law, or a criticism of existing law, it can be designated for publication. Only cases designated for publication are authoritative precedent that will be controlling authority for future cases. Tex. R. App. P. 47.7.

Sometimes Justices who participate in deciding a case may disagree about the result in the case or about the reasoning employed to reach the result. In those cases, the Justices who disagree can write separate opinions explaining their thoughts. If a Justice disagrees with the result in an appeal, his opinion will be called a dissenting opinion or a dissent. If a Justice agrees with the result, but not necessarily with the reasoning of a majority opinion, his or her opinion will be called a concurring opinion or a concurrence. Tex. R. App. P. 47.5.

XII. Motions for Rehearing

A party to an appeal has 15 days from the date that an appellate opinion is released to file a motion for rehearing and/or a motion for "en banc" reconsideration. Tex. R. App. P. 49. 1; Tex. R. App. P. 49.7. A court of appeals can extend the time for

filing a motion for rehearing or a motion for "en banc" reconsideration if a proper motion for extension of time is filed within 15 days after the last date for filing the motion itself.

A response to a motion for rehearing is usually not necessary. However, a court of appeals may not grant a motion for rehearing unless a response has been: (1) filed, or (2) requested by the court of appeals. Tex. R. App. P. 49.2. Further motions for rehearing may not be filed unless on the first motion for rehearing the court vacates or modifies the judgment or issues a different opinion. Tex. R. App. P. 49. 5.

XIII. Discretionary Review

In Texas we have two high courts: the Texas Supreme Court and the Texas Court of Criminal Appeals. The Texas Supreme Court only has jurisdiction over civil cases (which, incidentally includes juvenile cases which are considered civil matters according to Texas law). The Texas Court of Criminal Appeals, on the other hand, only has jurisdiction over criminal cases. As a result, when review is sought of a court of appeals opinion in a criminal case, that review must be sought in the Texas Court of Criminal Appeals. When review of a court of appeals opinion in a juvenile case is sought, however, that review must be sought in the Texas Supreme Court.

The Court of Criminal Appeals has the authority to review a decision of a court of appeals on its own initiative, or upon petition by a party. Discretionary review by the Court of Criminal Appeals is not a matter of right. The Court has discretion to deny review of a case, and in fact it does deny most petitions for discretionary review. Some but not all of the considerations for granting discretionary review are listed in the rules of appellate procedure. They include cases where court of appeals' decisions are in conflict and cases in which a statute has been misconstrued or declared unconstitutional. Tex. R. App. P. 66.3.

If a party wants the Court of Criminal Appeals to review a decision of the court of appeals in a given case, the party may file a petition for discretionary review asking the Court to review the decision. The petition must be filed within 30 days after the court of appeals opinion is issued or within 30 days after the last timely motion for rehearing or motion for "en banc" reconsideration was overruled by the court of appeals. Tex. R. App. P. 68.2(a). If a motion for an extension of time to file a petition for discretionary review is filed in the Court of Criminal Appeals within 15 after the last day for filing the petition, the Court of Criminal Appeals may grant an extension of time to file the petition. Tex. R. App. P. 68.2(c). Also, within 10 days after the filing of a petition for discretionary review by one party, any other party who is entitled to file a petition may file their own petition. Tex. R. App. P. 68.2(b).

Like petitions for review in civil (and juvenile) cases which are filed directly in the Texas Supreme Court, a petition for discretionary review in a criminal case must be filed directly with the clerk of the Court of Criminal Appeals. Tex. R. App. P. 68.3. The opposing party has 15 days after a petition for discretionary review is filed to file a reply to the petition with the clerk of the Court of Criminal Appeals. Tex. R. App. P. 68.9. Within 15 days of receiving notice of the filing of a petition for discretionary review from the clerk of the Court of Criminal Appeals, the clerk of the Court of Appeals must forward the record and all motions, orders, opinions and judgments of the court of appeals to the clerk of the Court of Criminal Appeals. Tex. R. App. P. 68.7.

If at least four Judges of the Court of Criminal Appeals vote to grant review of a decision of a court of appeals, a petition for discretionary review will be granted. Otherwise, it will be refused. Tex. R. App. P. 69.1.

If review is granted, the petitioner must file a brief within 30 days after review is granted. Tex. R. App. P. 70.1. The opposing party then has 30 days after the petitioner's brief is filed to file a reply. Tex. R. App. P. 70.2. Upon the filing of a proper motion by either party, the Court may extend the deadlines for filing briefs.

Like the intermediate courts of appeals, the Court of Criminal Appeals has the authority to deny oral argument, even when requested. When oral argument is permitted, however, the parties are usually allotted 20 minutes per side to argue their case to the Court.

XIV. High Court Opinions

All cases decided by the Texas Supreme Court and the Texas Court of Criminal Appeals are decided by the court acting "en banc." Like in the courts of appeals, some Judges who disagree with the reasoning or result reached by the majority of the court may author concurring or dissenting opinions. There is no time limit or deadline for the court to issue its opinions. Typically, it will release an opinion in a case within six months to one year from the date of submission. Still, the court could take longer in a particular case.

XV. Mandate

When a mandate from an appellate court is received by a trial court clerk, the appellate court's judgment must be enforced. Tex. R. App. P. 51.2.

The clerk of an appellate court that has decided a case on appeal must issue a mandate after the expiration of 10 days from the last day to file a motion to extend the time to file a petition for discretionary review in one of Texas' two high courts – the Texas Court of Criminal Appeals and the Texas Supreme Court, so long as no such petition has been filed. Similarly, the clerk of one of Texas' high courts that has reviewed a lower court of appeals decision must issue a mandate after the expiration of 10 days from the last day to file a motion to extend time to file a motion for rehearing if no motion for rehearing or no motion to extend the time is then pending. Tex. R. App. P. 18.1.

A party may move to stay the issuance of a mandate pending the United States Supreme Court's disposition of a petition for writ of certiorari. Tex. R. App. P. 18.2. But a mandate may also be issued early if the parties agree, or for good cause, on the motion of a party. Tex. R. App. P. 18.1(c).

XVI. Certiorari

When an appeal raises questions that involve the interpretation of the United States Statutes or Constitutional provisions, the parties may seek review in the United States Supreme Court. Review is sought in the United States Supreme Court by a Petition for Writ of Certiorari. It is relatively rare for a party to file a Petition for Writ of

Certiorari. It is even more rare for the United States Supreme Court to grant such a petition and review an appeal from a state court. Still, it is a possibility.

XVII. Victim's Rights Concerning Appeals.

A victim, guardian of a victim, or close relative of a deceased victim is entitled, if he or she makes a request, to be informed by the attorney representing the state of relevant appellate court proceedings, including whether those proceedings have been canceled or rescheduled prior to the event, and the right to be informed by an appellate court of decisions of the court after the decisions are entered but before they are made public. Tex. Code Crim. Proc. Ann. art. 56.02(a)(3).

XVIII. Habeas Corpus – Generally.

An application for the writ of habeas corpus is not an appeal or a substitute for an appeal. It may not be used to raise errors that could have been raised in an appeal. Historically, our courts have permitted only jurisdictional defects, constitutional violations, or fundamental errors to be raised in an application for writ of habeas corpus.

An application for writ of habeas corpus is an application for an order to a person or entity who has restrained an individual's freedom in some way to bring the restrained person forward and show why the restraint is lawful. In cases where a person is confined or sentenced pursuant to a judgment in a criminal case, an application for a writ of habeas corpus is a "collateral attack" on the judgment. It is actually treated as a separate lawsuit challenging the judgment that authorizes confinement or the sentence.

One advantage defendants have in habeas corpus proceedings, which they do not have in direct appeals, is that they can produce new evidence directly germane to the claims they are advancing. In a direct appeal, the appellate court is limited to a review of the record from the trial court that already exists. In a habeas proceeding, however, an applicant can submit affidavits, and many times the applicant can call witnesses and submit new evidence supporting their claims.

A party filing an application for the writ of habeas corpus bears both the burden of production and the burden of persuasion to demonstrate that he or she is entitled to the relief sought. *Ex parte Thompson*, 153 S.W.3d 416, 427 (Tex. Crim. App. 2005).

XIX. Pre-Trial Habeas Applications

Pre-trial applications for the writ of habeas corpus are not uncommon. Persons accused of a crime may seek to challenge, in a pre-trial writ of habeas corpus, things like the amount of the bond set in their case or the validity of a judgment of conviction that has been alleged in a charging instrument as an enhancement to the offence they are alleged to have committed. Pre-trial writs of habeas corpus are also used to challenge the constitutionality of a statute that an accused is charged with violating, and to assert claims of double jeopardy. A trial court's refusal to entertain a pre-trial application for writ of habeas corpus is not appealable. However, if the trial court considers the merits of the claims raised in the application, then its order granting or denying relief is an appealable order. *Ex parte Hargett*, 819 S.W.2d 866, 868-869 (Tex. Crim. App. 1991).

XX. Habeas Applications in Capital Felony Cases

Post-conviction applications for habeas corpus in capital murder cases are governed by article 11.071 of the Texas Code of Criminal Procedure. Unlike post-conviction applications for the writ of habeas corpus in non-capital cases, a habeas application in a capital case may be filed and litigated during the pendancy of the direct appeal involving the same conviction and sentence.

Upon the filing of a habeas application in a capital case pursuant to article 11.071 of the Code of Criminal Procedure, a trial court may take affidavits or hold hearings on the questions raised in the application. The trial court may also make findings of fact, conclusions of law, and recommendations. But after the trial court has taken those actions, it must forward the application, any responses, any affidavits taken, and the record of any hearings held to the Court of Criminal Appeals. Only the Court of Criminal Appeals can grant or deny relief on the application.

Generally, a defendant is entitled to file only one application for a writ of habeas corpus challenging his conviction and sentence in a capital case. If a subsequent application is filed, the defendant has the additional burden to show that the claims raised have not been and could not have been raised previously or that, but for a violation of the United States Constitution no rational juror could have found him guilty or sentenced him to death. Tex. R. App. P. 11.071, § 5. Subsequent applications filed in the trial court must be sent immediately to the Court of Criminal Appeals and may not be acted upon unless the Court of Criminal Appeals first determines that the additional burden for subsequent habeas applications has been met.

XXI. Habeas Applications in Non-Capital Felony Cases

Post-conviction applications for habeas corpus in non-capital felony cases are governed by article 11.07 of the Texas Code of Criminal Procedure. Unlike post-conviction applications for the writ of habeas corpus in capital cases, a habeas application in a non-capital case may not be filed and litigated during the pendancy of the direct appeal involving the same conviction. See *Ex Parte Brown*, 662 S.W.2d 3, 4 (Tex. Crim. App. 1983)(no habeas jurisdiction while direct appeal is pending).

Upon the filing of a habeas application in a non-capital felony case pursuant to article 11.07 of the Code of Criminal Procedure, a trial court may take affidavits or hold evidentiary hearings on the questions raised in the application. The trial court may also make findings of fact, conclusions of law, and recommendations. But after the trial court has taken those actions, it must forward the application, any responses, any affidavits taken, and the record of any hearings held to the Court of Criminal Appeals. Only the Court of Criminal Appeals can grant or deny relief on the application.

Generally, a defendant is entitled to file only one application for a writ of habeas corpus challenging his conviction and sentence in a non-capital felony case. If a subsequent application is filed, the defendant has the additional burden to show that the claims raised have not been and could not have been raised previously or that, but for a violation of the United States Constitution no rational juror could have found him guilty. Tex. R. App. P. 11.07, § 4. Unlike in capital cases, if a subsequent application is filed in a non-capital felony case, the trial court may make its own determination concerning

whether a defendant has met his additional burden. But ultimately, the Texas Court of Criminal Appeals will review the trial court's decision on that question when it acts to grant or deny relief on the application.

XXII. Habeas Applications in Misdemeanor Cases

Post-conviction applications for habeas corpus in misdemeanor cases are governed by article 11.05 and 11.09 of the Texas Code of Criminal Procedure. In a misdemeanor case, a habeas application can be presented to either a county court at law or a district court. Misdemeanor habeas applications are distinct from capital felony habeas applications, and non-capital felony habeas applications, mainly because the final decision on relief is not reserved to the Court of Criminal Appeals. Rather, relief can be granted or denied directly by the judge to whom the application is presented. The judge's order granting or denying relief, however, is appealable.

XXIII. Habeas Applications in Community Supervision Cases

Post-conviction applications for habeas corpus in cases where an applicant seeks relief from an order or a judgment of conviction ordering community supervision are governed by article 11.072 of the Texas Code of Criminal Procedure. These habeas applications are designed to permit applicants to challenge either: (1) the validity of the conviction for which or order in which community supervision has been imposed, or (2) the conditions of community supervision themselves. Like habeas applications in misdemeanor cases, the judge to whom the application for habeas relief is presented decides whether relief should be granted or denied. The trial judge's order granting or denying relief, however, is appealable.